No. 75-1495

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

v.

WANDA JUNE WEEKS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REPLY MEMORANDUM FOR THE APPELLANTS

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Solicitor General,
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1. The principal contention in our jurisdictional statement was that the district court had given insufficient deference to the broad powers of Congress in the distribution of tribal property by holding that Congress could not favor the federally-recognized Absentee and Cherokee Delaware Tribes over the descendants of Indians whose tribal relations were severed more than a century ago. Appellees' response (Motion to Dismiss or Affirm 8, 9) is that the possession of a reservation is the *sine qua non* of Indian tribal existence, and they correctly note that the Cherokee and Absentee Delawares do not live on reservations.[1] But the Cherokee and Absentee Delawares are federally-recognized tribes and were so at the time that

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[1]Because of the unique history of Oklahoma, there are presently few, if any, of the type of Indian reservations found in other states.

25 U.S.C. (Supp. IV) 1291-1297 was enacted.[2] They have tribal governments in which their members participate and which provide services (particularly social and health-related services) to the community, often under programs of the Bureau of Indian Affairs or in conjunction with other tribes.

Moreover, the fact that some members of these tribes may live outside of the formal tribal community does not distinguish the Cherokee or Absentee Delawares from other tribes with or without a reservation. Non-reservation tribes share with other Indian tribes the problem of being a culturally-distinct people in a Nation largely of non-Indians[3] and are deserving, as are other Indian tribes, of the protection of Congress. The important question is whether the federal government has acknowledged a responsibility towards these people as a group, through federal recognition of their tribe; where, as here, that recognition exists, tribal members are entitled to the unique treatment and protection upheld in *Morton* v. *Mancari*, 417 U.S. 535, 551. Appellees, as descendants of Indians whose tribal membership was severed more than a century ago,

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[2]Appellees' statement (Motion 4) to the contrary, concerning the Delaware Tribe of Indians (the Cherokee Delawares), is incorrect. See, *e.g.*, the "Resolution Establishing By-laws Under Which the Delaware Tribal Business Committee Shall Speak and Act in Behalf of the Delaware Tribe of Indians," which was adopted on September 7, 1958, and was approved by the Commissioner of the Bureau of Indian Affairs on May 31, 1962 (Answer 50 to interrogatories to the Secretary of the Interior, with attachments). See also the Act of April 21, 1904, 33 Stat. 189, 222, which provides for payments to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct * * *."

[3]Even Indian tribes possessing reservations often live in a community of non-Indians, particularly since much reservation land was long ago sold out of Indian ownership in order to encourage interaction among the races. See, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481, 496.

have failed to explain why Congress is powerless to treat their group differently from the Cherokee and Absentee Delawares.

2. Although appellees correctly contend (Motion 3-4) that membership in the Absentee Delaware Tribe does not precisely coincide with the persons specified in 25 U.S.C. (Supp. IV) 1292(c)(2), the persons specified in the statute bear a sufficiently close relationship with that tribe that they could be accorded full membership by the tribe. It is well established that Congress has the power to specify the persons who are tribal members for purposes of the distribution of tribal funds, as it has done here, so long as those persons have a tribal relationship. *Sizemore* v. *Brady,* 235 U.S. 441, 447; *Simmons* v. *Eagle Seelatsee,* 244 F. Supp. 808, 813 (E.D. Wash.), affirmed, 384 U.S. 209; Cohen's *Handbook of Federal Indian Law* 98-99 (1941).

3. Appellees erroneously imply (Motion 7, 12) that the Indian Claims Commission judgment funds are not tribal property. However, since the money is recompense for a wrong done the tribe (the party to the breached treaty), not to individuals, the judgment funds are tribal rather than individual property. See *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 307; *Minnesota Chippewa Tribe* v. *United States,* 161 Ct. Cl. 258, 270-271, 315 F.2d 906, 913-914; *Cherokee Freedmen* v. *United States,* 195 Ct. Cl. 39, 50-51.[4]

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[4]The fact that Article IX of the Treaty of July 4, 1866, 14 Stat. 793, makes payable to persons leaving the Delaware Tribe a just proportion of the assets "*then* held in trust by the United States" (emphasis added) certainly did not vest the Kansas "Delawares" with a right to a distribution under an Indian Claims Commission judgment nearly 100 years later. The Just Compensation Clause of the Fifth Amendment therefore did not prevent Congress from determining to distribute that money to persons associated with existing, federally-recognized Delaware tribal entities. See *Northern Cheyenne Tribe* v. *Hollowbreast,* No. 75-145, decided May 19, 1976, slip op. 7.

4. In sum, the decision of the district court in this case is an unprecedented restriction on the broad power of Congress to allocate tribal property. The thrust of appellees' assertions is that Congress could and should have included them in the distribution authorized by 25 U.S.C. (Supp. IV) 1292. They have failed to demonstrate, however, why Congress' contrary determination, in an area marked by such wide legislative discretion, is unconstitutional. Plenary review of this case is necessary to resolve this important question.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1976.